

Shainis & Peltzman, Chartered

Counselors at Law

Suite 240

1850 M Street, N.W.

Washington, D.C. 20036

(202) 293-0011

Fax (202) 293-0810

e-mail: shainispeltzman@s-plaw.com

Aaron B. Shainis

aaron@s-plaw.com

Lee J. Peltzman

lee@s-plaw.com

Of Counsel

William H. BuRoss, III

bill@s-plaw.com

Robert J. Keller

rkeller@s-plaw.com

August 26, 2002

RECEIVED

AUG 26 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Marlene H. Dortch

Secretary

Federal Communications Commission

445 12th Street, S.W.

Washington, D.C. 20554

Re: BK Radio
FM Broadcast Station KOTY
Channel 239C2
Mertzon, Texas
Counterproposal

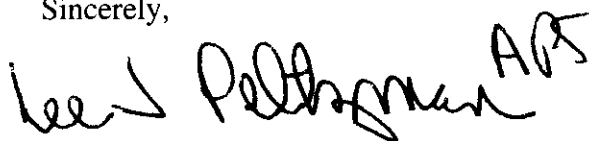
02-167

Dear Ms. Dortch:

Transmitted herewith, on behalf of BK Radio, are an original and four (4) copies of its Counterproposal and Comments pursuant to the *Notice of Proposed Rule Making*, DA-02-1553 (released July 5, 2002).

Please contact the undersigned in the event the Commission has questions with respect to this matter.

Sincerely,

 APS

Lee J. Peltzman

Counsel for

BK RADIO

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Enclosures

ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

AUG 26 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re:)
)
Amendment of Section 73,202(b),) MB Docket No. 02-167
Table of Allotments,) RM-10479
FM Broadcast Stations) RM-
(Eldorado, Texas))

TO: Assistant Chief, Audio Division
Media Bureau

COUNTERPROPOSAL AND COMMENTS

BK Radio ("BK"), permittee of FM Broadcast Station KOTY, Channel 239C2, Mason, Texas, by its attorney, and pursuant to the Notice of Proposed Rule Making in the above-captioned matter,¹ hereby respectfully submits its Counterproposal, and urges that the public interest, convenience and necessity as well as a fair, efficient and equitable distribution of broadcast facilities would be better served by amendment of the Commission's FM Table of Allotment to change the community of license for KOTY(FM) from Mason to Mertzon, Texas and substitute Channel 240C2 for Channel 239C2. In support of its Counterproposal BK submits the following:

At the outset, BK states that, should the Commission substitute Channel 240C2 for Channel 239C2 and allow the reallocation of that channel from Mason to Mertzon, Texas, BK will file an application to obtain approval to effectuate that change and will promptly construct and operate KOTY after grant of its application.

¹ *Notice of Proposed Rule Making*, DA 02-1553 (released July 5, 2002).

There is appended hereto as an Exhibit a Technical Statement by engineer and BK partner James S. Bumpous. Mr. Bumpous states that (1) Channel 240C2 can be allocated to Mertzon in place of Channel 239C2 at Mason at coordinates 31° 07' 15" N, 100° 32' 10" W and (2) the proposed use of Channel 240C2 at Mertzon conflicts with KOTY's construction permit and with the proposal of Katherine Pyeatt to allot Channel 241A at Eldorado, Texas. The BK proposal also complies with the Commission's technical rules. Operation of KOTY on Channel 240C2 from the proposed reference site would provide the required city grade coverage to Mertzon and would comply with the Commission's minimum distance separation requirements.

The reallocation of Channel 240C2 to Mertzon will result in a net gain in 60 dBu service to 82,844 persons. The loss area of 21,093 persons will not present a problem since that population will continue to receive adequate aural service.² See Technical Statement.

Only one aural service is presently assigned to Mertzon (Channel 266A), and, accordingly, grant of this Counterproposal would provide Mertzon with its second local aural service while Mason would continue to be served by five services -- Channel 224A, Channel 269C3, 960826MH (Channel 273C2), Channel 281C2 and 960826MS (Channel 289C2).

In reviewing a proposal to change a station's community of license, the Commission compares the proposed allotment plan and the existing state of allotments for the communities involved.³ To determine whether a proposal would result in preferential arrangement of allotments, the Commission is guided by its FM allotment priorities. The FM priorities are as

² *Llano and Marble Falls*, 12 FCC Rcd 6809 (1997), *recon. denied*, 13 FCC Rcd 25039 (1998).

³ *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). In order to be granted a change in community of license: (1) the proposed use of the channel must be mutually exclusive with its current use; (2) the existing community of license must retain local service; and (3) the proposed arrangement of allotments must be preferred over the existing arrangement under the Commission's allotment priorities. BK's Counterproposal satisfies all three requirements.

follows: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. Co-weight is given to priorities (2) and (3).⁴

The substitution of Channel 240C2 for Channel 239C2 and its reallocation to Mertzon, Texas falls under allotment priority (4) because it will bring a second local service to Mertzon, while Mason will continue to retain five local services. In contrast, retention of the allotment at Mason would leave Mason with six local services and Mertzon with only one local service. Mason will retain local service and any loss area will remain well served. Moreover, since KOTY is not yet operational, there will, by definition, be no loss of existing service. A comparison of the proposed allotment plan and the existing state of allotments demonstrates that a grant of the BK proposal would achieve a preferential arrangement of allotments.

Mertzon is listed in the U.S. Census as a city and it already has a channel allotted to it. Therefore, it clearly qualifies as a community for allotment purposes.⁵ Mertzon also is not located in an Urbanized Area and, as such, no *Tuck*⁶ showing is required. See Technical Statement.

The BK Counterproposal presents an allotment that is mutually exclusive with the initial proposal and would achieve a preferential arrangement of allotments based on the Commission's allotment priorities. A second local service would be provided to the community of Mertzon, thus invoking the fourth FM allotment priority. Moreover, the Counterproposal would create a net gain in service to 82,844 persons. BK's Counterproposal should clearly be favored over the Eldorado proposal under the Commission's allotment priorities since this proposal offers a

⁴ *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

⁵ See *Brookline, Missouri*, 10 FCC Rcd 13038 (1995); *Revision of FM Assignment Policies and Procedures*, *supra*, at para. 34 (noting that listing in the Census is sufficient to demonstrate community status.)

⁶ *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

second local service and new aural service to over 80,000 persons whereas the proposal to allot a channel to Eldorado would be a third or fourth service (Channel 258C1 has also been proposed for allotment to Eldorado in MM Docket No. 01-273), and only provide new service to a relatively minuscule 2,007 persons. Accordingly, examination of these mutually exclusive proposals, based on the FM allotment priorities and resulting public interest benefits, clearly weighs in favor of granting the BK Counterproposal.

However, in order to resolve the conflict between BK's Mertzson's counterproposal and the Channel 241A Eldorado proposal, BK proposes an alternate allotment of Channel 263A in lieu of Channel 241A at Eldorado, as that community's third or fourth service (the "Alternate Eldorado Proposal"). *See* Technical Statement. Adoption of the Alternate Eldorado Proposal would permit the Commission to grant both the Mertzson Counterproposal and the initial Eldorado proposal, resulting in the provision of new service to two communities. The Alternate Eldorado proposal complies with the Commission's technical requirements, although it will result in the substitution of three channels in pending Petitions for Rule Making: Channel 261A for Channel 263A at Rocksprings, Texas; Channel 283C for Channel 263C at Ft. Stockton, Texas; and Channel 276C, 278C or 243C at Balmorhea, Texas.⁷ *See* Technical Statement.

⁷ Station KHYS(FM), Abilene, Texas presently operates on Channel 264C and was recently issued a construction permit for Channel 264C1. In recognition of the fact that KHYS has never sought to implement the Commission allotment of Channel 263C (MM Docket 97-84), operates on Channel 264C and has even applied for and received a permit for Channel 264C1, BK urges the Commission to delete Channel 263C at Abilene.

In light of the foregoing, the Commission should grant the BK Counterproposal to change the channel of KOTY from 239C2 to 240C2 and change its community of license from Mason to Mertzon, Texas.

Respectfully submitted,

BK RADIO

By:


Lee J. Peltzman
Its Attorney

Dated: August 26, 2002

Shainis & Peltzman, Chartered
1850 M Street, NW, Suite 240
Washington, D.C. 20036
Tel: 202-293-0011

BK Radio Counterproposal Engineering Statement

In the matter of:

MB Docket No. 02-167, RM-10479

BK Radio ("BK") holds a construction permit for Channel 239C2 at Mason, Texas (BPH-19960823MF) which has been assigned the call sign "KOTY". BK herein proposes to change the City of License and Channel of KOTY to Channel 240C2 at Mertzon, Texas at reference coordinates:

N. 31° 07' 15"
W. 100° 32' 10"

From these coordinates, KOTY can provide 70dbu coverage to the entire city of Mertzon, Texas (Ex. 1).

This proposal is mutually exclusive with both KOTY's construction permit as well as the proposed allocation of Channel 241A to Eldorado, Texas (MB Docket No. 02-167, RM-10479) (Ex. 2).

Mason, Texas has been allocated Channels 224A, 239C2, 273C2, 281C2, 289C2, and 269C3, thus Mason would continue to be adequately served. Since KOTY has not yet commenced operation, this proposal would not deprive Mason of an existing service.

This counterproposal would provide a new service to 103937 people, while 21093 people would loose the potential service of KOTY. Of those 21093 people who would potentially loose service:

- 135 would continue to receive 2 aural services
- 439 would continue to receive 3 services
- 6915 would continue to receive 4 services, and
- 13604 would continue to receive 5 or more services.

In contrast, the proposed allocation of Channel 241A at Eldorado would provide new service to 2007 people.

Mertzon, Texas is not in any urbanized area, and the 70-dbu contour of the BK proposal would not encompass more than 50% of any urbanized area. Therefore a "Tuck" study is not required. Mertzon, Texas has previously been allocated channel 266A; therefore, Mertzon's status as a community worthy of service is established.

In order to provide an alternate channel for use at Eldorado, Texas, BK proposes the substitution of channel 263A for 241A at Eldorado. Channel 263A can be allocated to Eldorado at N. 30-51-36, W. 100-36-00. From these reference coordinates, Channel 263A will provide 70dbu coverage to the entire city of Eldorado, Texas (Ex. 3)

The allocation of channel 263A at Eldorado conflicts with two pending petitions for rulemaking:

- Channel 263A for Rocksprings, Texas, and
- Channel 263C at Ft. Stockton, Texas

BK proposes to substitute Channel 261A for the requested Channel 263A at Rocksprings. Channel 261A can be allocated at N. 30-00-00, W. 100-21-0. From these coordinates, 70dbu service can be provided to the entire town of Rocksprings. (Ex. 4)

BK also proposes to substitute Channel 283C for the requested Channel 263C at Ft. Stockton, Texas at reference coordinates N. 30-50-22, W. 103-13-11. From these reference coordinates, 70dbu signal can be provided to the entire city of Ft. Stockton. (Ex. 5) The allocation of Channel 283C at these coordinates conflicts with a proposed allocation of Channel 283C at Balmorhea, Texas; however, several alternate channels are available at Balmorhea, including:

Channel 276C at coordinates N. 30-48-38, W. 103-56-34 (Ex. 6)

Channel 278C at coordinates N. 30-36-28, W. 103-43-48

Channel 243C at coordinates N. 30-41-25, W. 103-45-41

For the reasons stated above, BK requests the following changes to Section 73.202 of the Commission's rules:

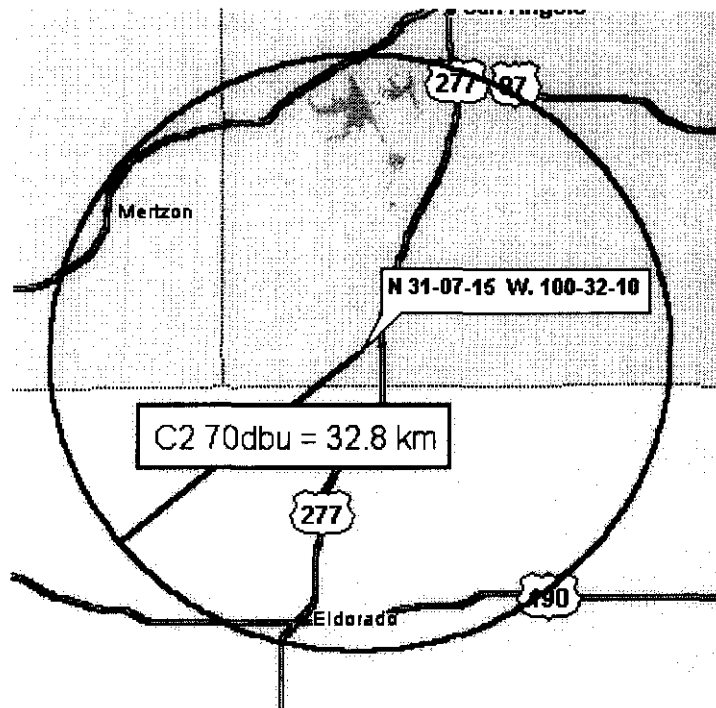
Mason, Texas	Current 224A, 239C2, 273C2 281C2, 289C2, 269C3	Proposed 224A, 273C2 281C2, 289C2, 269C3
Mertzon, Texas	Current 266A	Proposed 240C2, 266A
Eldorado, Texas	Current 285A, 293A	Proposed 263A, 285A, 293A
Fort Stockton, Texas	Current 232A	Proposed 232A, 283C
Balmorhea, Texas	Current -	Proposed 276C

All information contained in this engineering statement is true and correct to the best of my knowledge and belief. My qualifications are a matter of record with the Commission.

A handwritten signature in black ink, appearing to read "J. Bumpous". The signature is stylized with a large, sweeping initial "J" and a horizontal line extending from the top of the "Bumpous" portion.

James S. Bumpous, Partner, BK Radio

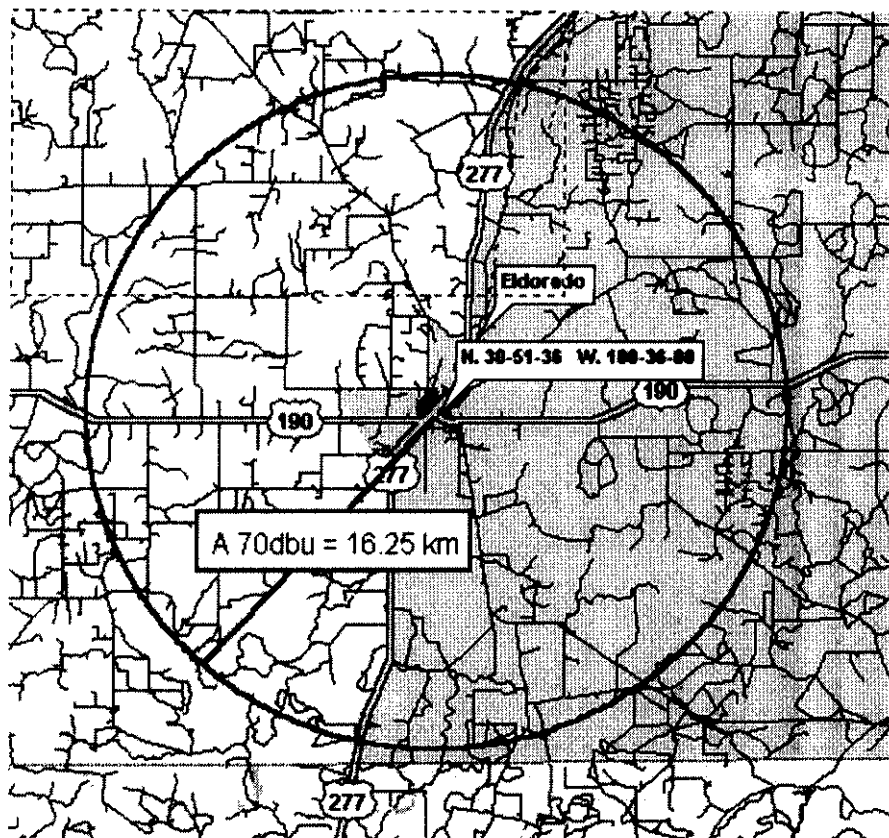
Ex. 1
Channel 240C2 Mertzon, Texas Proposal



Ex. 2
Channel 240C2 Mertzon, Texas Proposal
N. 31° 07' 15"
W. 100° 32' 10"

Ch	Class	Call	City	State	Co	Status	N	W	Reqd	Dist	Clear
241 A			ELDORADO	TX	US	ADD	30 50 56	100 36 23	106	30.9	-75.11
239 C2	960823MF		MASON	TX	US	CP	30 33 53	99 27 13	130	120.54	-9.46
243 C2	KCSE		STERLING CITY	TX	US	CP	31 35 56	100 50 42	58	60.57	2.57
243 C2	KCSE		STERLING CITY	TX	US	LIC	31 35 56	100 50 42	58	60.57	2.57
237 C3	NEW		SONORA	TX	US	ADD	30 36 35	100 43 9	56	59.31	3.31
241 C2	KATX		WINTERS	TX	US	LIC	32 12 52	99 53 22	130	135.87	5.87
242 A			MENARD	TX	US	ADD	30 59 47	99 52 6	55	65.24	10.23
293 A			ELDORADO	TX	US	ADD	30 51 14	100 36 43	15	30.48	15.48
239 C2	KBST-FM		BIG SPRING	TX	US	LIC	32 13 13	101 26 25	130	149.01	19
238 A			BALLINGER	TX	US	ADD	31 38 3	99 53 13	55	83.98	28.98
243 D	KSCE-FM1		SAN ANGELO	TX	US	LIC	31 27 42	100 26 4	0	38.99	38.99
239 L1			SAN ANGELO	TX	US	APP	31 27 43	100 26 3	0	39.03	39.03

Ex. 3
Channel 263A Eldorado, Texas



Channel 263A Eldorado, Texas

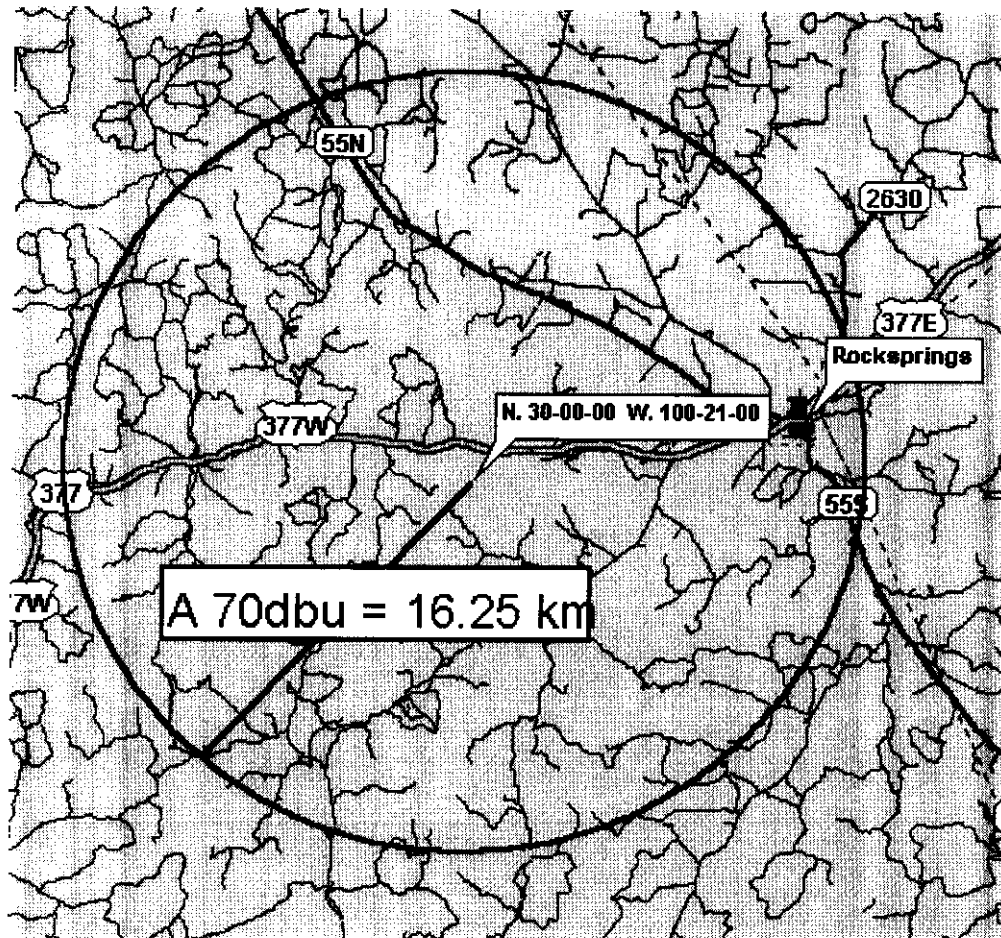
N. 30° 51' 36"

W. 100° 36' 00"

Ch	Class	Call	City	State	Co	Status	N			W			Reqd	Dist	Clear
*263 C			ABILENE	TX	US	VAC	32	21	57	100	2	58	226	174.92	-51.09
263 C			FT. STOCKTON	TX	US	ADD	30	50	6	102	45	6	226	205.82	-20.19
263 A	NEW		ROCKSPRINGS	TX	US	ADD	30	1	30	100	20	6	115	96.03	-18.97
262 C1	NEW		CRANE	TX	US	ADD	31	5	48	102	6	6	133	145.8	12.8
264 C	KORQ-FM		ABILENE	TX	US	LIC	32	24	48	100	6	25	165	178.44	13.43
261 C2	KYZZ		SAN ANGELO	TX	US	LIC	31	29	46	100	28	39	55	71.46	16.45
266 A			MERTZON	TX	US	VAC	31	15	30	100	49	0	31	48.73	17.72
264 C	KHYS		ABILENE	TX	US	CP	32	16	35	99	35	38	165	183.79	18.78
264 C	KHYS		ABILENE	TX	US	CP	32	27	3	99	46	16	165	193.09	28.09
265 C2	NEW		MENARD	TX	US	VAC	30	44	0	99	44	0	55	84.14	29.14

*Abilene, Texas was allocated Channel 263C in 97-84, DA 98-1419; however, station KHYS operates on Channel 264C and recently obtained a construction permit for Channel 264C1 under the "one step" provisions of the commission's rules.

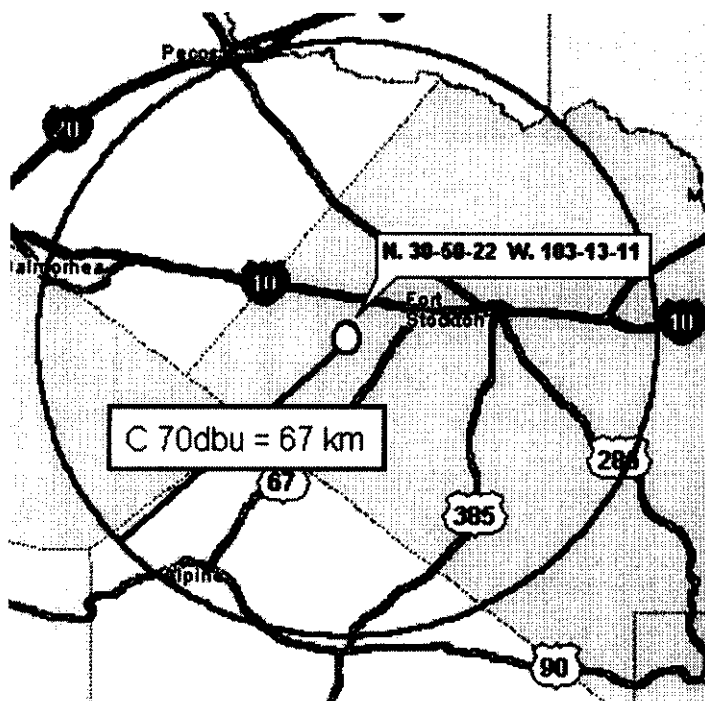
Ex. 4
Channel 261A Rocksprings, Texas



Channel 261A Rocksprings, Texas
N. 30° 00' 00"
W. 100° 21' 00"

Ch	Class	Call	City	State	Co	Status	N	W	Reqd	Dist	Clear
263 A	NEW		ROCKSPRINGS	TX	US	ADD	30 1 30	100 20 6	31	3.11	-27.9
261 C2	KYZZ		SAN ANGELO	TX	US	LIC	31 29 46	100 28 39	166	166.29	0.28
262 C	KCY Y		SAN ANTONIO	TX	US	LIC	29 31 25	98 43 25	165	165.93	0.93
262 C	KCY Y		SAN ANTONIO	TX	US	LIC	29 31 25	98 43 25	165	165.93	0.93
263 A	Prop		Rocksprings	Tx	Us	ADD	29 57 17	100 21 9	0	5.03	5.03
258 C1			ELDORADO	TX	US	ADD	30 47 49	100 37 29	75	92.19	17.18
260 A	FR		HUNT	TX	US	VAC	30 7 18	99 25 39	72	89.97	17.96
260 B			PIEDRAS NEGRAS	CI	MX		28 41 58	100 31 56	125	145.24	20.24
260 B	XHSGFM		PIEDRAS NEGRAS	CI	MX		28 41 58	100 31 56	125	145.24	20.24
261 C3	NEW		SANDERSON	TX	US	ADD	30 15 8	102 22 53	142	197.73	55.72

Ex. 5
Channel 283C Ft. Stockton, Texas



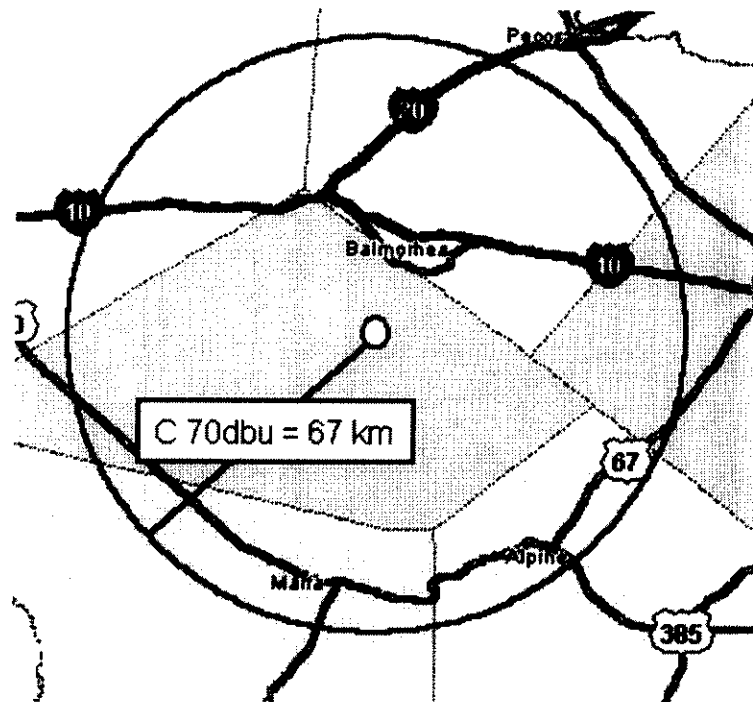
Channel 283C Ft. Stockton, Texas

N. 30° 50' 22"

W. 103° 13' 11"

Ch	Class	Call	City	State	Co	Status	N	W	Reqd	Dist	Clear
283 C	NEW		BALMORHEA	TX	US	ADD	31 8 42	103 36 54	290	50.69	-239.3
284 C1	KMMX		LAMESA	TX	US	LIC	32 23 47	101 57 24	209	210.15	1.15
286 C2			SANDERSON	TX	US	ADD	30 3 18	102 35 1	105	106.3	1.29
284 B			EL PORVENIR	CH	MX		31 15 0	105 52 20	215	257.24	42.24
284 A			LAS GARZAS	CH	MX		29 0 0	103 22 25	161	204.45	43.44
280 C			VENTANAS	CH	MX		30 15 56	104 45 37	105	160.9	55.9
281 C1	KWTR		BIG LAKE	TX	US	CP	31 38 21	101 37 42	105	175.64	70.63
285 B			JOSE MARTINEZ	CH	MX		29 59 15	104 41 58	98	170.67	72.66
281 A	KWTR		BIG LAKE	TX	US	LIC	31 11 54	101 27 45	95	172.46	77.46
285 C1	KYXX		OZONA	TX	US	VAC	30 42 43	101 7 29	105	201.07	96.06
284 C1	KMOU		ROSWELL	NM	US	LIC	33 24 49	104 22 49	209	305.7	96.69
283 B	XHCHAFM		CHIHUAHUA	CH	MX		28 38 12	106 4 42	270	368.9	98.89

EX. 6 Channel 276C Balmorhea, Texas



Channel 276C Balmorhea, Texas

N. 30° 48' 38"

W. 103° 56' 34"

Ch	Class	Call	City	State	Co	Status	N			W			Reqd	Dist	Clear
277 C1		KCRS-FM	MIDLAND	TX	US	LIC	32	5	11	102	17	11	209	211.64	2.63
276 A		KPAS	FABENS	TX	US	LIC	31	35	42	106	11	58	226	231.97	5.96
275 C1			HOBBS	NM	US	USE	32	42	0	103	7	54	209	223.12	14.12
275 C1		KIXN	HOBBS	NM	US	LIC	32	47	12	103	7	3	209	232.6	23.59
273 B			OJINAGA	CH	MX		29	33	53	104	25	23	98	145.67	47.66
273 B		XHHIHF	OJINAGA	CH	MX		29	32	52	104	23	35	98	146.57	48.56
274 B			CAJONCITOS	CH	MX		30	56	0	105	29	30	98	148.74	50.74
276 B			CIUDAD ACUNA	CI	MX		29	19	33	100	55	51	270	333.82	63.81
275 C3			OZONA	TX	US	ADD	30	42	30	101	12	6	176	262.69	86.68

CERTIFICATE OF SERVICE

I certify that on this 26th day of August, 2002, I caused to be sent by U.S. Mail, postage prepaid, copies of the foregoing Counterproposal to the following:

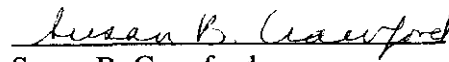
Katherine Pyeatt
6655 Aintree Circle
Dallas, TX 75214

Sharon P. McDonald*
Federal Communications Commission
445 12th Street, S.W., Rm. 3-A226
Washington, D.C. 20554

Linda Crawford
3500 Maple Avenue
Suite #1320
Dallas, TX 75219

Jeraldine Anderson
1702 Cypress Drive
Irving, TX 75061

Marissa G. Repp, Esq.
Hogan & Hartson, LLP
555 13th Street, NW
Washington, DC 20004-1109


Susan B. Crawford

*By Hand Delivery